

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600
Hours: M-F 8:30 - 4:00

Case No. S-2456

PETITION OF 7401 LINDBERGH, LLC

OPINION OF THE BOARD

(Hearings held January 17, 2001 and September 25, 2001)
(Effective date of Opinion: January 8, 2002)

This proceeding is a petition for a special exception pursuant to Section 59-G-2.06 of the Zoning Ordinance of Montgomery County, Maryland, Montgomery County Code, 1994, as amended (the Zoning Ordinance) to permit the construction and operation of an automobile filling station and ancillary convenience store.

The property which is the subject of this petition consists of 57,794 sq. ft. of land ("the special exception area") being Lot 17, Block A, Montgomery County Business Park, located in the southeast quadrant of the Woodfield Road (MD. 124) and Lindbergh Drive intersection near the Montgomery County Airpark in the I-1 Zone, in the Upper Rock Creek planning area.

Decision of the Board: Requested special exception **DENIED**.

A hearing was held pursuant to Section 59-A-4.11(a) of the Zoning Ordinance on January 17, 2001. Stanley D. Abrams, Esquire represented the Petitioner. The Petitioner's witnesses at the hearing included: Kenneth Colbert, civil engineer and land planning consultant; Phillip Perrine, land planning consultant; Lee Cunningham, transportation and land planning consultant; Aris Mardirossian, representative of the applicant and John Sherwood, expert in market analysis.

No persons or organizations appeared in opposition at the public hearing nor were there any representatives from the Maryland National Capital Park and Planning Commission technical staff or People's Counsel of Montgomery County present. On February 21, 2001 the Board issued an opinion granting the Petition.

Shortly thereafter the Montgomery County Revenue Authority, owner of the neighboring airport, timely filed a motion for reconsideration, asserting that it did not receive notice of the special exception petition, required under § 59-A-4.46(A)(5). The

Authority opposed the petition because it (1) would adversely affect the health and safety of all those in the area¹ and (2) the proposed use will be detrimental to the economic value of the airport.² Petitioner opposed the motion. The Board voted 3-1 to issue a resolution granting the Authority's motion, staying the earlier decision, and scheduling an additional hearing limited to the safety issue – the location of an automobile filling station in the airport's runway protection zone (RPZ) and denied that portion of the Authority's motion relating to detrimental impact to the economic value of the airport.

The Petitioner then filed a "Motion to Remove Stay of Board's Decision" arguing that the resolution granting the Revenue Authority's motion for reconsideration failed for lack of necessary four (supermajority) votes.³ The Revenue Authority opposed the motion. Following oral argument on September 5, 2001, the Board denied the motion, ruling that a motion to reconsider is a procedural motion that requires only a simple majority of three votes under § 59-A-4.123(f).

The Board held the additional hearing on September 25, 2001. Once again, Stanley D. Abrams, Esquire represented the Petitioner. The Petitioner's witnesses were: Kenneth Colbert, civil engineer and land planning consultant; Richard Sturtevant, structural and geotechnical engineer; Ken Purks, aircraft accident investigator and risk consultant analyst; Ronald Price, airport design and aviation consultant, and Aris Mardirossian, representative of the applicant. Associate County Attorney Edward B. Lattner, Esquire represented the Revenue Authority in opposition to the petition and called Ken Brammer, airport design and planning consultant as the Revenue Authority's sole witness.

EVIDENCE PRESENTED AT JANUARY 17, 2001 HEARING.

1. The special exception area consists of 57,794 sq. ft. of land being a recorded lot (Lot 17, Block A, Montgomery Business Park) containing 1.3268 acres of land in the I-1 Zone within the southeast quadrant of Woodfield Road (MD. 124) and Lindbergh Drive near the Montgomery County Airpark in Gaithersburg, Maryland. The property abutting Lot 17, which is not subject to this special exception contains 46,200 sq. ft. of land and would be devoted to what was described as "flex space" as a permitted use in the I-1 Zone. The property was part of a lot also known as Lot 15 and was the subject of preliminary plan approval (1-84196) by the Montgomery County Planning Board reflecting an allocation of the size and type of land uses for Lot 15 and other lots within the subdivision and contains a limit on the maximum square footage of specified land uses within Block A of the Montgomery Business Park subdivision as part of the Adequate Public Facilities Ordinance review. Lot 15, Block A was resubdivided into Lot 17 which is part of this application and Lot 18 containing the "flex" space which is

¹§ 59-G-1.21(a)(8).

²§ 59-G-1.21(a)(5).

³§ 59-A-4.123, §59-A-4.124(c)

not part of this application.⁴ The property subject to the special exception is rectangular in shape with approximately 227 feet of frontage on Woodfield Road (Md. 124) and 340 feet of frontage on Lindbergh Drive. The site is vacant and unforested with a level topography several feet below the grade of the adjacent streets.

2. The properties north of and across Lindbergh Drive from this site are zoned I-4 and developed with a variety of light industrial uses. Properties immediately east and south of the site are zoned I-1 and developed with light industrial uses to the east and the motor vehicle inspection station to the south respectively. Beyond the adjoining I-1 zone property to the south, the property is vacant and zoned RE-1. This residentially zoned land contains an easement for the northern approach (landing path) for the Montgomery County Airpark. The Airpark property, located directly across Md. 124 and west of the subject site is zoned R-200. Immediately north of the Airpark and northwest of the subject site, the properties are zoned I-4 and developed with light industrial uses. Directly adjacent to the subject site is the Maryland Motor Vehicle Administration Inspection Station.
3. The subject site is within the Upper Rock Creek Master Plan area which recommends a combination of I-4 and I-1 zoning on the east side of MD 124. The Master Plan characterizes the area as a mixture of light industrial, commercial, residential and park land uses some of which are affected by over flights of aircraft using the Montgomery County Airpark.
4. The application as most recently amended (Exhibits 24(a) & (c) & 30) proposes an automobile filling station containing multi-product dispensers on six pump islands, capable of filling twelve vehicles. The pump islands would be covered by a canopy approximately 40' x 90' in size; a "T" shaped canopy extension from the main building (approximately 69' x 24') and no repair service or car wash facilities would be offered on site. A 2960 sq. ft. convenience store building (Exhibits 5(a)) would be located on the east side of the property with twenty five (25) parking spaces in front of and in close proximity to the store. There is no direct connection between the automobile filling station and the "flex" space proposed for the remainder of Lot 15.
5. The automobile filling station and ancillary convenience store would operate seven (7) days a week, 24 hours a day. The facility would operate in three (3) shifts, consisting of eight (8) hours per shift with a maximum number of three (3) employees per shift and additionally a station manager would rotate among the shifts.

⁴The Board originally granted the special exception on a portion of Lot 15. After that decision, the Petitioner subdivided that lot into Lots 17 and 18, and sold Lot 18. Petitioner has now identified the special exception area as solely Lot 17.

6. Vehicular access to the site includes a 30 feet wide full-movement access from Lindbergh Drive and a 17 foot wide right turn in access on Woodfield Road configured to prevent left turn movements into or out of the site. While the staff report (Exhibit 23) notes that site access from MD 124 on the record plat is prohibited on MD 124 (Exhibit 23, pp. 4, 5) it is further noted that MD. 124 is under the jurisdiction of the State Highway Administration (SHA) and that the SHA by letter dated January 5, 2001, has approved ingress only access from MD 124 to this property (Exhibit 24(b)). If this application had been granted it may necessitate revisions to record plat No. 584-36 and the preliminary plan of subdivision (No. 1-84196).
7. The special exception area would contain approximately 25% green space along the perimeter and in the interior of the site. A 20 foot landscape strip which includes an existing 10 foot wide public utility easement (PUE) is be included along the Woodfield Road frontage and portions of the Lindbergh Drive frontage. The proposed landscaping includes evergreen trees, canopy trees and bushes, as more fully depicted in the revised landscape plans (Exhibit 24(c)).
8. Three (3) underground storage tanks would be located on the northwest corner of the subject site and an enclosed trash dumpster is located adjacent to the convenience store building in the northeast portion of the property.⁵
9. Storm water management quantity controls would be provided by a regional pond servicing the entirety of the Montgomery Business Park. Quality controls if not also provided by the regional pond will be provided on existing Lot 17, in a manner acceptable to Montgomery County.
10. A 25- foot sign⁶ located at the northwest corner of the property near the intersection will contain an oil company and convenience store logo symbol, oil company pricing and related information (Exhibit 5, sheet 4). There would be additional signage on the facia of the building and upon the canopy all in conformance with the Montgomery County Sign Regulations. Pole type lighting standards with downward illumination as depicted at locations in the revised site plan will direct lighting downward onto the site and will not shine onto adjacent areas except at site entrance locations. Lights mounted under the canopy will be spaced approximately 12 feet apart and will not exceed 55 foot candles in illumination. "Eyebrow" lighting would be placed along the perimeter of the canopy and along the front and part of the side of the building. Security lighting is proposed to be placed along the front of the convenience store building and along the rear and south side of the building.

⁵ Two tanks hold 10,000 gallons of fuel and one tank holds 15, 000 gallons. The tanks are below a concrete, steel reinforced pad area.

⁶ At the hearing on September 25, 2001, the Petitioner indicated it was no longer proposing a 25-foot tall sign.

11. The convenience store building would be set back 159'+ from Woodfield Road (MD 124), 110' + from Lindbergh Drive, 104' + from the south property line and 11' + to the proposed "flex" space located to the rear of the building. The gasoline pumps are proposed to be set back approximately 55 feet from Woodfield Road and the distance of the driveway entrances from the intersection will be 150'+ from Lindbergh Drive and 238'+ on Woodfield Road.
12. The technical staff of the Montgomery Planning Board while finding the application in compliance with all general and special conditions for approval of this use recommended denial finding that the Petitioner did not satisfy the "neighborhood need" requirement of Section 59-G-1.24 of the Zoning Ordinance. The Montgomery Planning Board however recommended approval of the special exception application, subject to certain recommended conditions, and disagreed with its technical staff finding that "an additional gasoline station at the proposed location would provide warranted service to the adjacent industrial park without saturating the area with unneeded service stations." (Exhibit No. 36).
13. Kenneth Colbert, professional engineer and land planning consultant testified with respect to the site design layout for the proposed automobile filling station and it's operational characteristics. He addressed the access and circulation to the site and within the property. Mr. Colbert explained the proposed lighting and signage and indicated by amendment to Exhibit 30 a third underground storage tank which will contain diesel fuel. He explained that the gas pumps were located approximately 45 feet behind the building line and the driveway access points were considerably in excess of the zoning ordinance minimum 20 feet from the intersection. He explained that there would be no repair facilities or car wash and the use would not produce any adverse noise or fumes. In his opinion the subject special exception as reflected in the site plan would not be detrimental to the use and enjoyment of adjacent properties and that there were no inherent or non-inherent adverse affects caused by the proposed use.
14. Phillip Perrine, land planning consultant introduced an aerial photograph (Exhibit 31) and testified as to the boundaries of the planning neighborhood as identified on the exhibit, explaining the zoning and development pattern in the neighborhood. Mr. Perrine testified as to compliance of the application with the special and general requirements for an automobile filling station use including: that it was an allowable use in the I-1 Zone, that the use would not constitute a nuisance due to noise, fumes, odors, or physical activity or glare of lights, that the use was consistent with the area of master plan recommendations, that the use would be in harmony with the character of the neighborhood considering it's low population density, modest design and scale of the buildings, generous parking provisions, and the fact that it was located some distance from any residential uses. He noted that the use would not adversely affect the logical development of the neighborhood or be detrimental to the peaceful use and development of the surrounding properties since the type of development is consistent with the area master plan and would provide a complimenting service to the existing industrial development associated with. the Airpark area. Considering similarities of the subject use at this location with other automobile

filling stations in I-1 zoned areas he opined that the subject application would not produce any inherent or non-inherent adverse affects upon the adjacent properties or the neighborhood. This witness also explained that from a planning standpoint the proposed use would fulfill a public need in that it was expedient, reasonably convenient and useful to the public. The use would be convenient and useful to employers, employees and visitors to the adjacent industrial centers and would provide a service opportunity for residents and workers in the market area which require longer commuting distances to major highways and down county employment centers which in turn increases gasoline consumption.

15. Lee Cunningham, traffic consultant testified that he prepared a traffic analysis for this site and that all intersections would be operating at satisfactory levels of service provided that a minor improvement including the opening of a second southbound MD. 124 left turn lane at the Airpark Road intersection were open to accommodate peak hour left turn movements. He explained with this improvement the proposed use would meet the county Adequate Public Facilities Ordinance. He further noted that in the previous subdivision approval of this property, there were trips allocated for industrial use and the trips remaining from that approval in terms of previously approved light industrial development from preliminary plan No. 1-84196 was sufficient to accommodate this development. He further noted that vehicular access into the site and on site circulation was both safe and convenient for passenger cars and tanker trucks and that the proposed special exception at the subject location would not cause any inherent or non-inherent adverse affects from a traffic impact standpoint.
16. Aris Mardirossian, principal member of the Applicant, testified as to his experience in developing automobile filling stations in the county and explained the number of employees proposed and the operational shifts to be employed. He testified as to the nature of the convenience store building, the number of fuel dispensers and proposed signage to be incorporated. Mr. Mardirossian explained that the SHA had; approved an ingress only access point from Woodfield Road and that this was received after the staff report had been drafted. This witness explained factors he considered in arriving at a conclusion that a need existed for a filling station at this location. He explained that pursuant to an analysis of prices of gasoline of automobile filling stations within this market area as compared to the prices of gasoline of similar brand stations found elsewhere in the county, the prices were generally higher in this market area demonstrating a lack of competition and the fact that this significantly influenced the price charged for gas in this market area. He testified as to similar analysis for other service stations that he developed and from market studies in those cases comparing dollar volume and gallonage pumped as they influenced the price charged for gas in that market area.
17. John Sherwood, a market analyst, qualified as an expert in the preparation of needs analysis. Mr. Sherwood submitted a Proof of Needs Analysis (Exhibit 10) to substantiate that there is a need for the proposed use. Mr. Sherwood's analysis to determine if a neighborhood need existed for a gas station as required by Section 59-G-1.24 of the Zoning Ordinance included reviewing the

provisions of the Zoning Ordinance, making site visits to the property, collecting a variety of information including population data, traffic counts, gasoline sales standards and expenditures and relying upon two (2) decisions by the Maryland Court of Appeals regarding the issue of proof of need under the Montgomery County Zoning Ordinance standard. Mr. Sherwood explained his process in defining the overall market area, which included two (2) sub-market areas, that included the presence of five other gas stations in the market area. This witness explained the source of residential, commuter and employment statistics utilized in his analysis, determined the amount of growth from 1990 - 2000 and the projected increase in these growth figures to the year 2005. Mr. Sherwood thereafter determined the gross annual gasoline demand by residents, employees, businesses and transients in the market area between 1990 - 2000 to determine the overall gasoline demand volume for each of these market segments. He further explained that the next step was to apply availability rates to the gross demands in each of these market segments and compare this with the volume of gasoline determined from stations in the market area on an annual basis. Mr. Sherwood determined that the demand available in the market area was 10,824, 850 gallons annually in the year 2000 (Exhibit 10, Table 5) and that the demand was reduced by the gallonage pumped at existing stations in the market area being 8,312,000 gallons (Exhibit 10, Table 6) and, concluded that the unserved need therefore on an annual basis was 2,512,850 gallons in the year 2000. This fact which was more than sufficient in his opinion to demonstrate the need for an additional station in this market area for the public convenience and service even considering the present availability of this use within the subject market area. Mr. Sherwood also explained that there are other factors to be considered in the overall need question, including the price of gasoline, brand preference, and the use of credit cards for specific gasoline brands. He explained that each of these factors could cause patrons to by pass closer automobile filling stations and utilize the subject station.

18. One letter was received in opposition from the owner of a near by service station property objecting to the use of the property on the basis of a purported violation of the Lindbergh Park Owners By-Laws (Exhibit 21). The Board responded (Exhibit 22) that this factor was not an element within the Board's consideration of this application (Exhibit 22).

EVIDENCE PRESENTED AT RECONSIDERATION HEARING OF SEPTEMBER 25, 2001.

19. Mr. Brammer, The Revenue Authority's aviation consultant testified that the Montgomery County Airpark is located immediately west of the property, across Md. 124. The Airpark is a general aviation airport with a 4,200-foot runway serving single and twin engine, propeller and jet, aircraft. Because planes may take off from, or land on, either end of the runway, one end is denominated Runway 32 and the other end, Runway 14 (based upon compass direction). The proposed filling station is located off Runway 32. The airpark's "airport reference code" is B-II, signifying that it can accept aircraft with a maximum approach

speed of 120 knots (approximately 145 MPH) and a wing span of up to 79 feet long. With approximately 115,000 aircraft operations (take offs and landings) annually, the airpark is said to be the busiest in the state, second only to BWI. There are just over 250 aircraft based at the airpark. The airport layout plan forecasts an increase in both aircraft operations and airpark-based aircraft over the next 20 years. The airpark employs a large number of people and offers a variety of services, including charter flights, flight schools, flight clubs, and, of course, aircraft storage and maintenance. The civil air patrol, medivac units, and local traffic reporters also work out of the airpark.

20. Mr. Brammer further testified that the FAA has established certain safety zones, both on and immediately surrounding airport property. These zones include the runway protection zone (RPZ) and the extended runway object free area (EROFA). The proposal is located in the runway protection zone (RPZ) off Runway 32. (Exhibits 71A and 71B.) According to FAA Advisory Circular 150/5300-13 ¶2 (exhibit 72), the RPZ is a trapezoidal area “off the end of the runway end to enhance the protection of people and property on the ground” in the event an aircraft lands or crashes beyond the runway end. The FAA recommends clearing all objects from the RPZ, but especially “those which generally can have an adverse effect on the airport. These include objects in the inner part of the approach area (coinciding with the RPZ) such as fuel handling and storage facilities...”⁷ Elsewhere, the advisory circular states: “Land uses prohibited from the RPZ are residences and places of public assembly. (Churches, schools, hospitals, office buildings, shopping centers, and other uses with similar concentrations of persons typify places of public assembly.) Fuel storage facilities should not be located in the RPZ.”⁸

As testified by Mr. Brammer the proposal is also an unpermitted object located in the extended runway object free area (EROFA). (Exhibits 71A and 71B.) An object free area (OFA) is an area “on the ground, centered on a runway [as in this case], taxiway, or taxilane centerline provided to enhance the safety of aircraft operations by having the area free of objects except for objects that need to be located in the OFA for air navigation or aircraft ground maneuvering purposes.”⁹ Mr. Brammer did admit that the FAA had determined that the proposed use and development was not to be a hazard to Air Navigation because it did not actually violate any of the obstruction standards, as opposed to the safety zones.

21. Because of the proposal’s proximity to the airpark, Petitioner filed a “Notice of Proposed Construction or Alteration” with the FAA on March 28, 2001. (Exhibits 88 and 76.) This notice gives the FAA an opportunity to comment on the proposal.

⁷ FAA Advisory Circular 150/5300-13, ¶¶211(a)(7), (8) (exhibit 72).

⁸ FAA Advisory Circular 150/5300-13, ¶ 212(a)(2) (exhibit 72).

⁹ FAA Advisory Circular 150/5300-13, ¶¶ 2 and 307(a)(exhibit 72).

22. The record contains items of correspondence from various offices and divisions of the FAA (Exhibits 77, 78 & 79) objecting to the use. Mr. Brammer relied upon these items of correspondence in presenting his testimony.
23. By letter dated April 20, 2001, the Washington Airports District Office objected to the proposal because it is (1) a place of public assembly in the RPZ, (2) a fuel handling and storage facility in the RPZ, and (3) an unpermitted object in the EROFA.¹⁰ (Exhibit 77.)
24. By letter dated April 20, 2001, the Eastern Region Air Traffic Division (Airspace Branch) wrote that it “strongly discouraged” the proposal because it represented a place of public assembly in the RPZ, although it was not a hazard to air navigation (e.g., it does not violate any obstruction standards). (Exhibit 78.)
25. By letter dated May 1, 2001, the Eastern Region Airports Division agreed, and added that the proposal was also a fuel storage facility in the RPZ. (Exhibit 79.)
26. By letter dated May 22, 2001, the MAA similarly concluded that the proposal violates the RPZ. (Exhibit 80.)
27. Kenneth Colbert, the Applicant’s professional engineer described the location, construction and placement of the underground fuel tanks. The tanks are placed thirteen feet below the surface beneath eight (8) inches of steel reinforced concrete and contain automatic safety cut-off features to prevent explosion and fire. He also described automatic safety cut-off features of the pump dispensers if they are dislodged by a crash or other intrusion. He testified that in his opinion this use is not a “place of assembly” and that the FAA Advisory Circular pertains only to above ground objects and not underground fuel tanks. This witness stated that in his opinion the location of this use does not present a greater safety hazard than if this use were located at another site in the I-1 Zone. He noted that the Maryland Emissions station next door is also in the airport RPZ and that the subject property is less than 10% of the RPZ area with the underground tanks occupying less than 1% of the RPZ.
28. Victor Sturdevant, structural and geotechnical engineer for the applicant testified that based upon his study of the proposed facility that even in a worst case scenario, a plane crashing on top of the storage tank area would not penetrate the storage tanks or ignite its contents. Mr. Stuart Purks, an expert in aircraft and airport operations and aircraft accident investigation testified that based upon a standard risk analysis the statistical probability of an airplane either on take-off or descent hitting this property was extremely low. He testified that there was nothing about the use or buildings on this property that creates as adverse affect on safety either in the air or on the ground. He related that 99% of cases in

¹⁰The WADO also determined that the proposed 25-foot tall lighted sign violated one of the obstruction standards because it penetrated the approach surface for runway 32. At the hearing, Petitioner indicated that it was no longer proposing a 25-foot tall sign.

which an airplane struck the ground is due to the pilot, weather, mechanical or maintenance error and not anything occurring on the subject property. He did not believe that a gas station is a place of assembly or fuel storage facility.

29. Mr. Ronald Price, the Applicant's aviation consultant testified that the FAA reviews proposed construction on or near airports to determine whether there would be hazards to air navigation and the FAA determined the proposed construction and use to be no hazard to air navigation in this case. He noted that the FAA has no control over local land use and that FAA Advisory Circulars are recommendations when it involves property outside of an airports control. He testified that the property is not in the Runway Object Free Area of the airport.
30. Mr. Mardirossian, a principle member of the applicant, testified that population concentrations visiting the proposed establishment during any peak period would be about five (5) or six (6) person at a time and were not similar to those population concentrations of a school, hospital, shopping center or office building. Mr. Mardirossian further testified that there are significantly more cars and person driving on MD Rt. 124 closer to the subject airpark than would be located at any one time on the subject property.

FINDINGS OF THE BOARD

This case presents an unusual procedural posture because the Board found in its prior opinion of February 21, 2001 that the petition complied with all special conditions for approval contained in Section 59-G-2.06 of the Zoning Ordinance and general conditions applicable to all special exception uses in Section 59-G-1.21 of the Zoning Ordinance. The reconsideration hearing was confined to the allegations raised by the Revenue Authority that the Petitioner did not carry its burden of demonstrating that the use will not adversely affect the health, safety or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone as required in Section 59-G-1.21(a)(8) of the Zoning Ordinance.

While the Board has no evidence in the record to retract its previous findings on any of the conditions for approval except the findings required in Section 59-G-1.21(a)(8) of the Zoning Ordinance and hereby reaffirms those findings, a majority of the Board is of the opinion that the petitioned use will adversely affect the health, safety and general welfare of residents, visitors or workers on this property and in the area, irrespective of any adverse effects the use might have if established elsewhere on I-1 Zoned land and finds that the special exception should be denied. The Board heavily relies upon the guidelines and recommendations from the FAA with respect to the safe operation of the airport. Specifically in this regard the majority of the Board makes the following findings:

1. The Petitioner bears the burden of proving that the proposed use satisfies all applicable general and specific special exception standards. § 59-G-1.21(c). One of the general standards requires the Board to find, from a

preponderance of the evidence, that the proposal “will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.” § 59-G-1.21(a)(8).

2. The Petitioner has failed to meet its burden of persuasion as to this standard. The Board majority is persuaded by the testimony of Ken Brammer, the Revenue Authority’s expert, and the written comments of the MAA and the FAA that the proposed use, located so close to runway 32, will adversely affect the health, safety, security, and general welfare of residents, visitors, and workers in the area at the subject site, irrespective of any adverse effects the proposal might have if established elsewhere in the zone.
3. The proposal’s close proximity to the airpark and the resultant safety issues is a non-inherent adverse effect.
4. The FAA wrote that the proposal is both a “place of public assembly” and a fuel storage and handling facility within the meaning of its advisory circular, notwithstanding the fact that the storage tanks are located underground. The MAA concurred. The majority of the Board agrees with these interpretations and concludes the Petitioner’s proposed location of a place of public assembly and a fuel storage and handling facility in the runway protection zone presents an unacceptable safety hazard and will adversely affect the health, safety, security, and general welfare of residents, visitors, and workers in the area at the subject site, irrespective of any adverse effects the proposal might have if established elsewhere in the zone.
5. The FAA also wrote that the proposal is an unpermitted object in the EROFA. The Board agrees with this interpretation as well and concludes that Petitioner’s proposed location of an unpermitted object in the EROFA presents an unacceptable safety hazard and will adversely affect the health, safety, security, and general welfare of residents, visitors, and workers in the area at the subject site, irrespective of any adverse effects the proposal might have if established elsewhere in the zone.
6. The majority of the Board is persuaded by the FAA and MAA recommendations.
7. The majority of the Board is aware that neither the MAA nor the FAA have any enforcement power with regard to their determinations in this case. Nonetheless, those recommendations are still compelling evidence of the safety problems presented by the presence of the proposed use in the RPZ and EROFA. Those safety hazards are not mitigated by MAA/FAA’s lack of enforcement power.

8. But the Board's decision does not rest solely upon the FAA/MAA recommendations. Thus Petitioner's assertion that the FAA has misinterpreted its own advisory circular and that the proposal is not a "place of public assembly" or a "fuel handling and storage facility," is beside the point. Based on the evidence of record the Board independently concludes that the Petitioner has failed to meet its burden of persuading that the proposal "will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone." § 59-G-1.21(a)(8).
9. The majority of the Board is persuaded by Ken Brammer's testimony in this regard. When they do occur, airplane accidents typically take place during take-off or landing, on or in close proximity to the runway. Take-off and landing are the most demanding and complex portions of a flight. This is so for a number of reasons. First, there is simply less room under the plane for maneuvering, should the pilot need to make a sudden or unexpected flight correction. Second, the pilot is often performing other critical tasks at the same time. Finally, the engine is under the greatest stress at this time, especially during take-off. It is for this reason that the RPZ and EROFA are located where they are — in close proximity to the runway.
10. The Board does not believe that airplane accidents are probable; that is, they are not more likely to occur than not. But the Board must balance the likelihood of an accident against the consequences of an accident. Notwithstanding the safety precautions taken at the filling station (e.g., automatic shutoff valves on the pumps, fuel tanks buried below 8 inches of concrete) the Board believes that the consequences of an airplane accident at the filling station/convenience store could be catastrophic. Even if the on-site fuel did not add to the ensuing conflagration (a proposition the Board is not persuaded of), Petitioner's safety measures would do nothing to protect patrons from falling debris or the fuel in the airplane.
11. The Board majority is also persuaded by a letter received from the Aircraft Owners and Pilots Association (AOPA) (Exhibit 68) opposing the petition. AOPA argued that the proposed use was both an incompatible land use in the RPZ and an unpermitted object in the extended runway object free area.

On a motion by Angelo M. Caputo, seconded by Allison I. Fultz, with Donna Barron in agreement and Louise L. Mayer and Chairman Donald H. Spence, Jr. opposed, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the opinion stated above be adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 8th day of January, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four month period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.